KINNARD MEDIATION CENTER
UNITED STATES COURT OF APPEALS
ELEVENTH JUDICIAL CIRCUIT

MEDIATION AND GUIDELINES FOR EFFECTIVE MEDIATION REPRESENTATION

The Kinnard Mediation Center (formerly known as the Circuit Mediation Office) conducts mediation of civil appeals under Federal Rule of Appellate Procedure 33 and Eleventh Circuit Rule 33-1. The Court's mediation process provides confidential, risk-free opportunities for parties to resolve their dispute with the help of a neutral third-party. The mediations are conducted by the Court's circuit mediators, who are full-time employees of the Eleventh Circuit and have extensive trial and appellate experience as well as significant training and experience in mediation. The circuit mediators are located in Atlanta, Tampa, and Miami. Each year hundreds of appeals are resolved through the mediation program.

Appeal Selection

By local rule, all fully counseled civil appeals except prisoner, habeas corpus, and INS appeals are eligible for mediation conducted by the Kinnard Mediation Center. The Kinnard Mediation Center selects a cross-section of the eligible appeals for mediation. In addition, hearing panels may refer appeals to mediation either before or after oral argument. If counsel have not been notified that their appeal has been selected or referred to mediation and believe mediation would be beneficial, they may request mediation by calling the Kinnard Mediation Center. Such requests are treated as confidential and generally accepted in any fully counseled civil appeal.

Mediation Scheduling

The Kinnard Mediation Center sends written notice of the initial mediation to lead counsel. Participation in the mediation is mandatory; however, if the parties consult and all agree that mediation would not be productive, they may contact the mediator handling the appeal to discuss changing the scheduled mediation date to a half-hour assessment conference. The decision to change the scheduled mediation to an assessment conference rests with the mediator. *If counsel files a joint or unopposed motion to dismiss the appeal before the mediation, counsel should call the Kinnard Mediation Center to cancel the mediation.*

Most initial mediations are conducted by telephone, with the mediators initiating the calls. If counsel are located in the Atlanta area, Tampa area, or Miami area, the initial mediation may be held in person at the Kinnard Mediation Center or at a mutually agreeable location. At the mediators' discretion, mediations for appeals outside these areas also may be conducted in person at a mutually agreeable location in the circuit. The mediators travel to these locations at no expense to the parties.

What Participants Can Expect

The mediator begins the mediation by describing the mediation process, discussing confidentiality, and inquiring whether any procedural questions or problems can be resolved by agreement. The parties and the mediator will then discuss, either jointly or separately, and in no particular order, the following topics: (1) the legal issues and the appellate court's decision-making process regarding these issues (e.g., preservation of error, waiver, standards of review, etc.); (2) the history of any efforts to settle the case; (3) the parties' underlying interests, preferences, motivations, assumptions, and new information or other changes that may have occurred; (4) future events based upon the various outcome alternatives of the appeal; (5) how resolution of the appeal impacts the underlying problem; (6) cost-benefit and time considerations; (7) any procedural alternatives possibly applicable to the appeal (e.g., vocatur, remand, etc.). The discussion is not limited to these topics and will vary considerably because each appeal has its own circumstances. The mediator will also attempt to generate offers and counteroffers and may have several follow-up mediation sessions by telephone or in person until the case settles or it is decided the case will not settle.

Counsel should allow two hours for initial telephonic mediations; from four hours to all day for initial in-person mediations; and from 30 minutes to one hour for follow-up mediation sessions.

What the Center Expects

The Kinnard Mediation Center attempts to identify lead counsel for all parties when scheduling a mediation. Counsel should promptly advise the Center if the purposes of the mediation would be accomplished more effectively with different or additional attorneys or participants.

Counsel should prepare for the mediation by: (1) discussing with their clients their goals in resolving the litigation, preparing to negotiate in good faith and express their views on the appeal's merits as well as their clients' interests; (2) obtaining advance authority from their clients to make those commitments as may reasonably be anticipated, keeping in mind the appeal's potential worst-case scenario in establishing this authority; (3) having their clients present or available by phone at the time of the mediation and encouraging their clients to participate at every stage of the mediation process.

Mandatory Participation--Voluntary Settlement

Although the mediation sessions are relatively informal, they are official proceedings of the Court. Sanctions may be imposed against any party who fails to appear or otherwise participate fully. (See Rule 33-1(f)(2).) The mediation process is nonbinding, so no settlement is reached unless all parties agree.

Confidentiality

Court rule and verbal agreement of the parties at each mediation session ensure that nothing said or written by the participants, including the circuit mediator, regarding the mediation is disclosed to its judges or judges of any other court that might address the appeal's merits. The mediator's notes and counsel's "Confidential Mediation Statements" do not become part of the Court's file. The Kinnard Mediation Center will not reveal any request by counsel for mediation without the requesting party's permission. *Ex parte* communications are also confidential except to the extent disclosure is authorized. This confidentiality rule applies in all mediated appeals including those referred to mediation by a panel. The Court *strictly enforces* this rule.

Extensions of Time to File Briefs

Mediation does not automatically stay appellate proceedings. If the deadline for submitting a brief has not passed and counsel has not filed a motion for an extension of time to file the brief, the mediator may grant a request from counsel for an extension of time *if negotiations are productive and ongoing and all parties agree on extending the time*. Counsel should make their request by telephone to the mediator. If the mediator agrees to grant the extension, counsel should fax or mail a *confirmation letter* to the mediator, copied to opposing counsel, that contains: (1) a statement that the request was made to facilitate settlement; (2) a statement that the request was unopposed; (3) a statement confirming that the mediator has granted the extension; (4) the current due date; (5) the new agreed-upon due date (business day). The mediator will forward the *confirmation letter* to the Clerk, and the Clerk will update the docket to reflect the new due date. *If all parties do not agree to an extension or if the appeal is in impasse because negotiations were not productive*, counsel can obtain an extension only through the Clerk or Court. If counsel files a motion for an extension, it should not contain any reference to the Kinnard Mediation Center because the Court does not know which appeals are being mediated by the circuit mediators, except when a hearing panel has referred an appeal to them.

EXAMPLE CONFIRMATION: Re [appeal number and caption]. This confirms that to facilitate settlement you have granted my unopposed request to extend the time to file the [appellant's/appellee's] brief from the current due date of [date] to the new due date of [date].

NOTE: Send only ONE COPY of your confirmation letter. If you choose to send it by fax, mark it "By Facsimile Only."

"Confidential Mediation Statement"

The Kinnard Mediation Center recommends lead counsel submit a "Confidential Mediation Statement" to the mediator assessing their appeal. The "Confidential Mediation Statement" letter may be sent by either mail or fax, to arrive at least two days before the initial mediation. Counsel should not send pleadings in lieu of a "Confidential Mediation Statement." A "Confidential Mediation Statement" should include:

- a brief recitation of the circumstances that gave rise to the litigation;
- the present posture of the appeal (any matters pending in the lower court or in any related litigation);
- any recent developments that may impact on the resolution of the appeal;
- the history of any efforts to settle the appeal including any prior offers or demands;
- a summary of the parties' legal positions and a candid assessment of their respective strengths and weaknesses;
- identification of individual(s) and counsel you believe should be directly involved in the settlement discussions;
- description of any sensitive issues that may not be apparent from the court records but will influence the settlement negotiations;
- the nature and extent of the relationship between the parties or their counsel;
- your priority of interests;
- any suggested approach for the mediator to take in an attempt to settle the appeal ("problem" to be settled, sequence of issues);
- any suggested creative solutions;
- necessary terms in any settlement;
- any particular concerns about confidentiality;
- any limitations in your authority to make commitments on behalf of your client;
- any additional information your client or the other party needs to settle the case and whether it should be provided before the mediation.

NOTE: Send only ONE COPY of your "Confidential Mediation Statement." If you choose to send it by fax, mark it "By Facsimile Only."

How to Prepare for a Mediation

- Prepare thoroughly (as if you were going to a hearing or a trial) with the final goal of resolving the dispute in mind.
- Understand the rules of the Court and the role of the Kinnard Mediation Center.
- Initiate informal *ex parte* contacts with the mediator to discuss information that will help the mediator understand the appeal and your interests.
- Consider whether a premediation session with the mediator and your client would be beneficial.
- Prepare a "Confidential Mediation Statement" for the mediator.

The "Authority" Issue in Mediation

- If "having the right person involved in the negotiation" has been a problem in the past, raise the issue with the mediator *before* the mediation session. The better practice is to have a clear understanding of who will be present at the mediation and what authority they will have.
- Authority by "telephone standby" may be appropriate.
- In appeals where your client is a government or institution, understand the settlement approval process that applies and discuss your concerns and timetable issues with the mediator in advance.
- Understand whether the person has authority to decide or to "report and recommend" a proposed settlement to a superior.
- Do not play "hide the ball" with the mediator as to who has authority to resolve the appeal.
- Have someone with "worst-case authority" present.

How to Work with the Mediator

- Follow the mediator's cues. Look for two types of questions mediators may ask in initial joint session: (1) What happened? (2) What do you want from the mediation (priorities, interests, results)?
- If the mediator asks you to restate a point, be patient. The mediator may be asking you questions to elicit information that the other party needs to hear.
- Provide the mediator with legal, factual, and practical information that can be used to reality-test the other party's expectations.
- Use the mediator to point out settlement options and reality-test your client's expectations. Be candid and realistic about your "worst case."
- Use the mediator to suggest your proposals or to offer proposals as options "not owned by anyone."
- Confer with the mediator as to how or when to make proposals or settlement offers. Consider: What is your outcome analysis? What is a fair settlement analysis (range) in light of it? Is this a reasonable move in relation to where you are going?
- Confer with the mediator as to the best strategy towards closure and whether and when it is advisable to offer a "bottom-line" figure or a "best and last" proposal.
- Use the mediator to guide you in ascertaining whether there are impasses that take time to work out or whether the other side is intractable and the mediation should be terminated. If you must impasse, know precisely why you have been unable to settle and what must change before impasse can be broken.
- Be patient and persistent. Each mediation has its own rhythm and pace.

The Role of Appeal Evaluation in the Mediation

- Mediation is not designed for "deciding past rights and past wrongs"--that is more suitably the role of courts and arbitration. It is designed to help parties look forward to develop solutions for problems.

- After problems have become lawsuits there is the inevitable desire by the parties and counsel to have a third-party tell them "how they are going to do" in the appeal. The mediator will address that desire in such a way that does not blunt the overall objectives of mediation and unnecessarily narrow the focus but rather gives the parties and counsel some assistance, or tools, for *them* to better evaluate their appeal. In this part of the mediation process "self realization is the best form of persuasion."
- The mediator will not predict how the court will rule in a particular appeal, but rather attempt to clarify the issues on appeal.
- The mediator may discuss objective court information--how the court operates. Many times counsel have specific expectations about what they want to achieve; for example, a published opinion. The mediator may discuss the probabilities of that occurring and also discuss time lines and generic reversal rates.
- The mediator may discuss some of the court's decision-making components: (1) standards of review (including Rule 36-1); (2) preservation of error; (3) waiver; (4) new issues on appeal; (5) mootness.
- The mediator may discuss the various outcome options and how they may relate to the course of the litigation: (1) So what if you win? (2) So what if you lose? (3) Where is the money? (4) Does a resolution of the legal issues solve your problem? (5) Are you potentially headed for an inconclusive result?

The Elements of an Effective Initial Presentation (Not an Opening Statement)

- Look directly at the opposing party when addressing your remarks (if in person).
- A skillful initial presentation is not necessarily "conciliatory." There is nothing wrong with stating all the reasons for settlement but at the same time communicating that you are prepared for a judicial resolution of the legal issues. The style and tone of your approach will have a substantial influence in persuading the other side to listen to you and to seriously consider what you are saying.
- Discuss the "common ground" that the parties may have in seeking to resolve the situation.
- Let your client speak if you believe it appropriate, and let your client respond directly to questions from the mediator or the other side, if you are prepared to do so.
- Effectively use what you have developed in prior proceedings: prior rulings, deposition testimony, key documents, and any admissions.
- Do not use "legalese."
- Do not give everybody in the room the impression that you, the lawyer, are the gate through which all reason must pass before a settlement will be reached.
- Do not be antagonistic to the opposing party. Save your comments on personality problems and the conduct of parties or their counsel for private caucus with the mediator.
- Do not "draw a line in the dirt" in your initial presentation.
- When opposing counsel is giving their initial presentation: (1) Let them speak without argument or interruption. (2) Consider this an opportunity to learn new facts. (3) Use this as an opportunity to have the other side describe "what it really wants" in the dispute rather than restate its legal position. (4) Ascertain if the other side has a hierarchy of true interests. (5) Look for common ground.

(6) Assess the other party's weaknesses. (7) Listen carefully to what the other side is saying and even repeat back what the other side is saying to convince them that you have heard their position. (8) If a settlement proposal is made at the conclusion of the initial presentation, do not reject it out-of-hand. Given the fluid nature of many mediations, lawyers and clients may be presented with settlement possibilities (or proposals) that they had not considered at the outset.

- Work to draw your opponent to your position. ("Defeat your enemy by making him your friend.")

Private Caucuses with Client and Mediator

- Be clear about what information you expect the mediator to treat as confidential.
- Ask the mediator for more information about the other party's position.
- Use this opportunity to (1) do reality checking with your client; (2) discuss expectations with your client; (3) explore your strengths and weaknesses in the appeal; (4) discuss the other party's needs or interests; (5) discuss what information the mediator can use to do "reality-testing" of other party's expectations and position.
- Use "downtime"--when the mediator is having a private caucus with the other side--to review your client's interests in light of any new information and any historical information that may have become important and to "brainstorm" about possible solutions with your client and any co-counsel.

Mediation Don'ts

- Don't prevent the mediator from talking to your client (even with you present) or from talking with all the parties.
- Don't be afraid to ask for a moment during the mediation to speak privately with your client.
- Don't base your settlement strategy on how well you are going to do in a particular court.
- Don't take a backward step. If you offered a specific dollar amount prior to mediation, but came to mediation with a lower amount in hand, you injure your credibility.
- Don't accuse the opposing party or their counsel of "bad faith" during a mediation just because their settlement posture did not live up to your expectation.
- Don't burn your bridges during mediation. Your appeal may take an unexpected turn for the worse as it develops, and you may wish to re-initiate mediation.

Further information is available through the Kinnard Mediation Center, United States Court of Appeals, Eleventh Judicial Circuit, 56 Forsyth Street, NW, #535, Atlanta, Georgia 30303, telephone 404-335-6260, fax 404-335-6270; through its Tampa branch office at 801 North Florida Avenue, #1030, Tampa, Florida 33602, telephone 813-301-5530, fax 813-301-5539; through its Miami branch office at 51 Southwest First Avenue, #1304, Miami, Florida 33130, telephone 305-536-3005, fax 305-536-3010; and on the Internet at www.ca11.uscourts.gov.